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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE DAILY GAZETTE COMPANY, INC.,
Petitioner,

v.

RAYMOND A. HINERMAN,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Appeals
Of West Virginia

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Daily Gazette Company respectfully submits this reply to the brief in opposition filed by respondent Raymond A. Hinerman.

ARGUMENT

I. OF COURSE THE GAZETTE DOES NOT SEEK TO OVERTURN GERTZ: THE NEW YORK TIMES ACTUAL MALICE STANDARD APPLIES IN THIS CASE BECAUSE RESPONDENT SOUGHT AND WAS AWARDED PUNITIVE DAMAGES.

In an effort to avoid review, respondent claims that application of the actual malice standard on these facts would require the Court to overrule its decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Opp'n at 11-13.

This, of course, is pure fiction: The Gazette is *relying on* Gertz, not seeking to overturn it. Gertz requires even a private figure plaintiff to meet the "demanding standard" of New York Times if he seeks punitive damages. 418 U.S. at 350. As The Gazette noted in its petition, the

actual malice standard applies because respondent sought and received an award of punitive damages. Pet. at 7 n.7, 15.[1/]

That the New York Times standard applies not only in public official and public figure libel cases,

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1/ The actual malice standard also applies because respondent was a public official at the time of publication. Review of the opinion of the Neely majority confirms that the suggestion that respondent was not a public official is pure dictum. See Pet. App. at 21a ("we will assume for the purposes of reviewing the lower court's judgment that Mr. Hinerman was a public official"); id. at 44a ("resolution of [the public official] issue is not necessary for our decision in this appeal").

Viewed in context, the majority's gratuitous discussion of this issue is best understood as an effort to insulate the novel reasoning of the majority opinion from the impact of Supreme Court review, a possibility recognized by both the three-justice majority and the two dissenting justices. Id. at 44a, 75a.

but also in any private figure case in which punitive damages are sought, underscores the frequency with which the issues addressed in The Gazette's petition arise.[2/]

II. THE GAZETTE PROPERLY URGED APPLICATION OF THE CLEAR AND CONVINCING EVIDENCE STANDARD BOTH IN THE TRIAL COURT AND IN THE WEST VIRGINIA SUPREME COURT.

Respondent also attempts to evade review by asserting, without support in law or the record, that The Gazette did not properly preserve its argument that in an "actual malice"

2/ Another case currently before this Court on a petition for certiorari illustrates that the important issues raised in The Gazette's petition arise in a wide variety of circumstances and have been subject to a wide variety of judicial responses. See Rouch v. Enquirer and News of Battle Creek, Michigan, petition for cert. filed, 61 U.S.L.W. 3420 (U.S. Nov. 23, 1992) (No. 92-895).

libel case, the plaintiff must establish falsity by clear and convincing evidence. Opp'n at 8-11. To reach this conclusion, respondent is forced to postulate that the West Virginia Supreme Court would adopt a remarkable rule requiring a litigant intending to raise an argument for the Court's consideration to write some undisclosed minimum number of sentences (or paragraphs or pages?). Accordingly, he argues that The Gazette waived its argument that falsity must be proved by clear and convincing evidence while *actually quoting a passage from The Gazette's brief* in which it urged the West Virginia Supreme Court to apply the clear and convincing evidence standard in

reviewing the record for evidence of falsity. Id. at 9.

Respondent fails to identify any West Virginia decision specifying the number of sentences or paragraphs or pages that must be written before an error is considered properly raised.[3/]

The Gazette properly asked the trial court to instruct the jury that falsity must be established by clear and convincing evidence (R. 148, 173-77), objected to the court's instruction that a preponderance of the evidence would suffice (R. 243-44), and, in seeking independent appellate review, urged the West Virginia Supreme

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3/ Addair v. Bryant, the only case cited by respondent, stands only for the unremarkable proposition that an error may be deemed waived if it is neither briefed nor argued. 168 W. Va. 306, 284 S.E.2d 374, 383 (1981).

Court to review the record for clear and convincing evidence of falsity (Appellant's Brief at 19-20 n.3.). Since respondent has been unable to identify any West Virginia decision finding an argument waived on such facts, this Court's holding in Beck v. Washington, 369 U.S. 541 (1962), is inapplicable.

Moreover, even if this error had not been properly raised below, this Court's rules still would allow for review of the burden of proof of falsity as a subsidiary question fairly included within the broader question of whether an appellate court hearing an "actual malice" libel case must conduct an independent review to ensure that the plaintiff has met his constitutional burden of proving

falsity. See Sup. Ct. R. 14.1(a). The Court cannot engage in the independent review suggested by New York Times without deciding on the evidentiary standard by which falsity must be established.

III. THE WEST VIRGINIA SUPREME COURT DID NOT INDEPENDENTLY REVIEW THE RECORD FOR CLEAR AND CONVINCING EVIDENCE OF FALSITY.

In a final effort to escape review by this Court, respondent makes the wholly unsupported assertion that the West Virginia Supreme Court did in fact conduct an independent appellate review of falsity.[4/] Opp'n at 19-20.

4/ Apparently recognizing that the West Virginia Supreme Court did not independently review the record for clear and convincing evidence of falsity, respondent argues in the alternative that this Court should deny certiorari because this case does not

(continued...)

Unable to identify any

portion of the opinion below in which

4/ (...continued)
involve the right kind of falsity. Opp'n at 14-18. There is, of course, no support in the decisions, of this or any other court for respondent's contention that as a matter of constitutional law there are at least two classes of falsity subject to different constitutional analyses. Whether under the facts of a given libel case the dispute focuses on what the plaintiff did or on what the defendant said, the question of falsity ultimately turns on whether there is sufficient discrepancy between what the plaintiff actually did and what the defendant said about what the plaintiff did to permit an award of damages. That this question is *not* merely subsumed within the actual malice analysis has been clear since this Court decided New York Times v. Sullivan, 376 U.S. 254, 289 (1964) ("The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems . . ."). See also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (holding that even "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant").

the majority engaged in any analysis of falsity[5/], respondent supposes that since the court should have independently reviewed the record for evidence of falsity, it must have done so. See Opp'n at 19-20.

Respondent attempts to give this position the illusion of substance by pointing to language in the opinion below discussing the court's obligation to conduct an independent review of the actual malice issue. Id. at 19. But the majority opinion contains no analysis of falsity. The majority's independent review of actual malice, from which respondent divines an

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5/ Respondent's assertion that "[t]he West Virginia Supreme Court made such an assessment" is unsupported by any citation to that court's opinion. See Opp'n at 17 n.5.

analysis of falsity, addresses only questions of knowledge and reckless disregard. Pet. App. at 31a-33a. The West Virginia Supreme Court implicitly adopted the jury finding of falsity without analysis, despite the fact that the jurors were improperly instructed that the plaintiff in an "actual malice" libel case need only prove falsity by a preponderance of the evidence.

CONCLUSION

As explained in detail in The Gazette's opening brief, this Court should take this opportunity to resolve the pronounced split in lower court authority over whether the First Amendment requires independent appellate review in "actual malice" libel cases to ensure that falsity has

been proved by clear and convincing evidence.

Respectfully Submitted,

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